INSAS BHD & ANOR

v.

DATO' PARAM CUMARASWAMY

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[SUIT NO: S2(S1)-23-67-1996]
7 JULY 2000

CIVIL PROCEDURE: *Pleadings - Striking out claims and action - Grounds for - Immunity - Whether defendant enjoys immunity - Special rapporteur of United Nations - Convention on the Privileges and Immunities of United Nations, s. 22(b) art. VI*

CONSTITUTIONAL LAW: *Privileges and immunity - Special rapporteur of United Nations - Whether enjoys immunity from legal action*

CONFLICT OF LAWS: *Jurisdiction - Submission - International Court of Justice - Advisory opinion - Whether parties agreed to accept - Whether advisory opinion bound the courts*

The plaintiff commenced an action for defamation against the defendant. The defendant having entered a conditional appearance made an application for an order that the writ of summons be set aside and/or struck out and/or permanently stayed. The senior assistant registrar dismissed the application and ordered the defendant to enter his defence. The defendant appealed on the ground that he had total immunity from legal process of every kind in respect of words spoken or written and acts done by him in the course of the performance of his mission as a special rapporteur of the United Nations.

Held:

[1] The decisive acceptance of the ruling of the International Court of Justice (ICJ) by the parties in the earlier case of *Dato' Param Cumaraswamy v. MBf Capital Bhd & Anor* would prevail in respect of the instant case. Thus the court was bound by the advisory opinion of the ICJ in that the defendant enjoyed such immunity.

[Appeal allowed, writ of summons struck out, each party to bear its own costs.]

Case referred to:
Dato' Param Cumaraswamy v. MBf Capital Bhd & Anor [1998] 1 CLJ 1 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 12 r. 7
International Organisations (Privileges and Immunities) Act 1992, s. 7(1)

For the appellant/defendant - Porres P Royan (Trevor George De Silva with him); M/s Shook Lin & Bok
For the respondent/plaintiffs - V Sivaparanjothi (S Rutheran & Ashokvijay J Sanghrajka with him); M/s V Siva & Partners

JUDGMENT

RK Nathan J:

The 1st plaintiff was and is a public listed company and at all material times wholly owned by the 2nd plaintiff which was a licensed stock broking company. The defendant was at all material times a very senior member of the Malaysian Bar. The defendant was also appointed by the United Nations as the Special Rapporteur on the Independence of Judges and Lawyers of the United Nations Commission on Human Rights.

Terms Of Reference

At its 15th session, the Commission on Human Rights in resolution 1994/41, noting both the increasing frequency of attacks on the independence of judges, lawyers and court officials and the link which exists between the weakening of safeguards for the judiciary and lawyers and the gravity and frequency of violations of human rights, requested the chairman of the commission to appoint, for a period of three years, a special rapporteur whose mandate would consist of the following tasks:

(a) To inquire into any substantial allegations transmitted to him or her and report his or her conclusions thereon;

(b) To identify and record not only attacks on the independence of the judiciary, lawyers and court officials but also progress achieved in protecting and enhancing their independence, and make concrete recommendations including the provision of advisory services or technical assistance when they were requested by the State concerned;

(c) To study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers.

The Alleged Defamatory Statement

Between about September and November 1995, the defendant spoke and thereby published to one David Samuels, a staff writer of the International Commercial Litigation magazine (the magazine) and/or other representatives

of the magazine, of and concerning the plaintiffs, and of and concerning them in the way of their said business and in relation to their conduct therein the following words alleged to be defamatory in the circumstances, set out below:

> In answer to questions from the said representatives about the cases in which Dato' V.K. Lingam represented Insas Berhad and Megapolitan Nominees Sdn Berhad against the Ayer Molek Rubber Company Berhad, Malaysia Borneo Finance Holdings (MBfH) and its subsidiaries against the East Asiatic Company (EAC), Tan Sri Dato' Vincent Tan Chee Yioun against the publishers of the Malaysian Industry and others and Berjaya Industrial Berhad and Berjaya Corporation (Cayman) Berhad against CS First Boston; and about the alleged abuse of judicial procedures and/or about the alleged corruption of the Judiciary by Dato' V.K. Lingam and his clients in those cases the defendant said:
>
> > It would be unfair to name any names, but there is some concern about all this among foreign businessmen based in Malaysia, particularly among those who have litigation pending.
> >
> > I do not think that Malaysia would be able to repeat the result when its system of justice was ranked at the beginning of 1995 by the World Economic Forum in the top 25 systems in the world on the basis of replies by major companies in Malaysia, when asked what level of confidence they had in the justice system in the country in which they were located.
> >
> > Complaints are rife that certain highly placed personalities in the business and corporate sectors are able to manipulate the Malaysian system of justice. But I do not want any of the people involved to think I have yet made up my mind.
> >
> > Although these complaints only really came to prominence because of the judge-choosing allegations in the Ayer Molek affair, people first started to question the integrity of the judiciary after the M$10 million ($4 million) libel award which Vincent Tan received on October 22 last year.

The Plaintiffs' Case

It was the plaintiffs' case that the said words in their natural and ordinary meaning in the context in which they were spoken meant and were understood to mean that the plaintiffs and each of them had connived at, and participated in the corruption, or the attempted corruption by Dato' V.K. Lingam of the Malaysian Judiciary, in the course of the plaintiffs' litigation against the Ayer Molek Rubber Company Berhad, in Malaysia.

The plaintiffs further contended that in speaking and publishing the said words to the representatives of the magazine, the defendant authorised, intended and knew, or it was the natural and probable consequence of the defendant speaking and publishing the said words, that the said words or their gist would, or were likely to be published in a forthcoming issue of the magazine in a feature about the matters referred to as the alleged defamatory statement. The magazine is a leading magazine about commercial litigation with an extensive and influential distribution within the jurisdiction of this court.

It was also contended that the defendant published, or caused the republication of the said words as attributed to the defendant or their gist, in the November 1995 issue of the magazine, in the course of a feature article entitled "Malaysian justice on trial". The plaintiffs thus sued for damages, costs, interest and for an injunction.

The Application

The defendant then entered conditional appearance and applied (encl. 7) under O. 12 r. 7 of the Rules of the High Court 1980 (the RHC) and/or under its inherent jurisdiction for an order that the writ of summons be set aside and/or struck out and/or permanently stayed, with costs. The learned Senior Assistant Registrar (SAR) who heard encl. 7 dismissed the same with costs and ordered the defendant to enter his defence within 14 days from the date of her order. This is the defendant's appeal (encl. 19) against that said order.

Findings Of The Court

The defendant relied on s. 22(b) art. VI of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly of the United Nations on 13 February 1946 (the convention). The said s. 22(b) reads as follows:

> SECTION 22. Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular they shall be accorded:
>
> (a) …
>
> (b) In respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind.

This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations;

(c) …

(d) …

(e) …

(f) …

The defendant thus argued that he had total immunity from legal process of every kind in respect of words spoken or written and acts done by him in the course of the performance of his mission.

Dato' Param Cumaraswamy v. MBf Capital Bhd & Anor

The respondents MBf Capital Bhd and another also sued the same defendant in the Kuala Lumpur High Court for damages and for an injunction on similar grounds as are raised by the plaintiffs in this case. The defendant raised the same defence as has been pleaded in this case. The question arose as to whether the court ought to hear and decide the question of the defendant's immunity from legal process, as a preliminary issue or at the trial. The court of first instance decided that it would decide this issue at the trial proper and not as a preliminary issue. On appeal by the defendant, the Court of Appeal upheld this decision on 20 Oktober 97 (see *Dato' Param Cumaraswamy v. MBf Capital Bhd & Anor* [1997] 3 MLJ 824).

The secretary-general of the United Nations had by a certificate dated 21 November 1997 and addressed to "To Whom It May Concern", confirmed that the defendant was clothed with immunity. It is necessary to reproduce the said letter, which reads as follows:

21 November 1997

To Whom It May Concern

In connection with the Civil Suit (KL High Court Suit No S1-23-67 of 1996) by Insas Berhad and Megapolitan Nominees Sdn Bhd against Dato' Param Cumaraswamy, the Secretary-General of the United Nations hereby notifies the competent authorities of Malaysia that Dato' Param Cumaraswamy, national of Malaysia, is the Special Rapporteur on the Independence of Judges and Lawyers of the United Nations Commission on Human Rights. In this capacity, Dato' Cumaraswamy is entitled to the privileges and immunities accorded to experts performing missions for the United Nations under Articles VI and VII of the Convention on the Privileges and Immunities of the United Nations to which Malaysia has been a party since 28 October 1957 without any reservation.

In accordance with section 22 of Article VI of the Convention, "experts … performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions …". Section 22(b) of the Convention further provides that "they shall be accorded, in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind". As such, the Special Rapporteur on the Independence of Judges and Lawyers, is immune from legal process of every kind in respect of words spoken or written and acts done by him in the course of the performance of his mission.

The Secretary-General has determined that the words which constitute the basis of plaintiffs' complaint in this case were spoken by the Special Rapporteur in the course of his mission. The Secretary-General therefore maintains that Dato' Param Cumaraswamy is immune from legal process with respect thereto.

Under Section 34 of the Convention, the Government of Malaysia has a legal obligation to "be in a position under its own law to give effect to the terms of this Convention". The Secretary-General of the United Nations therefore requests the competent Malaysian authorities to extend to Dato' Param Cumaraswamy the privileges and immunities, courtesies and facilities to which he is entitled under the Convention on the Privileges and Immunities of the United Nations.

Sgd.

Kofi A. Annan

Further pursuant to s. 7(1) of the International Organisations (Privileges and Immunities) Act 1992 a certificate dated 12 August 1997 in respect of the defendant's legal immunity from legal process was also issued by the Honourable Minister for Foreign Affairs. However, the said letter has not been exhibited in respect of this matter.

It was therefore the contention of both the defendant and the secretary-general of the United Nations that the statements attributed to the defendant as reproduced in the impugned article were made in the defendant's capacity as the United Nations' Special Rapporteur and in the course of his mission which required him to carry out an examination or inquiry into the independence of the malaysian judiciary.

Reference By Consent For An Advisory Opinion

Whilst the Malaysian courts including the appellate court had decided that the issue of immunity as claimed by the defendant was a matter to be decided by this court during the course of the trial, the Government of Malaysia and the United Nations by consent agreed to refer this question of the defendant's immunity, for an advisory opinion to the International Court of Justice (the ICJ) pursuant to s. 30 of the convention which reads as follows:

> SECTION 30. All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties.

To my mind, whilst the Malaysian courts had made a decision binding on its citizens, the Malaysian government had voluntarily acceded to be bound by the advisory opinion of the ICJ. Soon after the decision of the Court of Appeal, the plaintiffs took out a bill of costs to tax their costs. The defendant immediately filed a motion (No. W-02-323-97) in the Court of Appeal on 1 October 1998 wherein he sought the following orders, namely:

> (1) that all proceedings be stayed pending receipt of the advisory opinion of the International Court of Justice in respect of the dispute between the United Nations and the Government of Malaysia on the Applicant's entitlement to immunity from legal process of every kind under the Convention and Privileges of the United Nations, 1946 including the taxation of the Respondents' Bill of Costs dated 24th day of March, 1998 and the Order of Costs made thereunder by the Deputy Registrar of the Court of Appeal;
>
> (2) that in the event the Allocatur/Certificate has been issued by the Deputy Registrar of the Court of Appeal, that the same be set aside and/or that execution thereon be stayed pending receipt of the advisory opinion of the International Court of Justice in respect of the dispute between the United Nations and the Government of Malaysia on the Applicant's entitlement to immunity from legal process of every kind under the Convention and Privileges of the United Nations, 1946;
>
> (3) that costs of this application be costs in the cause; and
>
> (4) such further or other relief as this Honourable Court deems fit.

After hearing arguments, the Court of Appeal, which incidentally was comprised of the same panel members who gave the decision of the Court of Appeal, gave an order on the notice of motion dated 1 October 1998 that the first order sought for in the motion be dismissed and that the motion be stood over and be fixed for mention on 2 February 1999 pending the receipt of the advisory opinion of the ICJ and that in the interim the registrar of the Court of Appeal was directed not to issue the allocatur in respect of costs that was taxed on 4 September 1998 pending further order of the court and finally that the costs of the motion was to be reserved.

It is clear therefore that whilst the judiciary being one of the three organs that ensures good governance, had agreed to stay execution on its own order by awaiting the advisory opinion, it must have been moved to do so because of the voluntariness of the executive in agreeing to abide by the decision of the ICJ in respect of the defendant's immunity. To compound this, the same plaintiffs were parties to the motion and there has been no appeal against the decision of the Court of Appeal granting a stay of execution until receipt of the advisory opinion of the ICJ. It does not now behove the plaintiffs to say that they were not parties to the reference to the ICJ because they too agreed to await the outcome of the advisory opinion. It is my judgment therefore that by their conduct in not appealing against the decision, the plaintiffs had agreed to give effect to s. 34 of the convention which reads as follows:

> SECTION 34. It is understood that, when an instrument of accession is deposited on behalf of any Member, the Member will be in a position under its own law to give effect to the terms of this convention.

The Advisory Opinion

The Preamble to the Advisory Opinion was as follows:

> 1. The question on which the Court has been requested to give an advisory opinion is set forth in decision 1998/297 adopted by the United Nations Economic and Social Council (hereinafter called the "Council") on 5 August 1998. By a letter dated 7 August 1998, filed in the Registry on 10 August 1998, the Secretary-General of the United Nations officially communicated to the Registrar the Council's decision to submit the question to the Court for an advisory opinion. Decision 1998/297, certified copies of the English and French texts of which were enclosed with the letter, reads as follows:

The Economic and Social Council,

> Having considered the note by the Secretary-General on the privileges and immunities of the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers,
>
> Considering that a difference has arisen between the United Nations and the Government of Malaysia, within the meaning of Section 30 of the Convention on the Privileges and Immunities of the United Nations, with respect to the immunity from legal process of Dato' Param Cumaraswamy, the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers,
>
> Recalling General Assembly resolution 89 (I) of 11 December 1946,

1. Requests on a priority basis, pursuant to Article 96, paragraph 2, of the Charter of the United Nations and in accordance with General Assembly resolution 89 (I), an advisory opinion from the International Court of Justice on the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations in the case of Dato' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, taking into account the circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General, and on the legal obligations of Malaysia in this case;

2. Calls upon the Government of Malaysia to ensure that all judgements and proceedings in this matter in the Malaysian courts are stayed pending receipt of the advisory opinion of the International Court of Justice, which shall be accepted as decisive by the parties.

The ICJ acknowledged the fact that this was the first time it had received a request for an advisory opinion that refers to art. VIII s. 30 of the General Convention. It is also a fact that both the United Nations and Malaysia had agreed to accept the opinion given by the ICJ "as decisive by the parties". This is a serious consequence which parties had willingly entered into and it is therefore a matter of grave concern for this court to be called upon to rule otherwise. Whilst this court might disagree with certain aspects of the decision of the ICJ, the decisive acceptance of the ICJ's ruling by the parties will in my view prevail in respect of this case because the parties had specifically agreed to refer this case for an advisory opinion from the ICJ. It is my judgment that this case should not be treated as a set precedent for all future cases.

It is however relevant for this court to express its views. Whilst it is well within the purview of the question posed, for the ICJ to rule as it did that "the Malaysian Courts had the obligation to deal with the question of immunity from legal process as a preliminary issue to be expeditiously decided *in limine litis*", by that same token the ICJ ought to have then remitted that question to the Malaysian court to decide. I do not think that it was appropriate for the ICJ to hold that the question of immunity ought to be decided as a preliminary issue and then to take upon itself the right to decide that the defendant enjoyed such immunity. What then is the purpose of holding that the Malaysian courts ought to deal with the question of immunity as a preliminary issue? Unfortunately as I said, all parties have agreed to be bound by the advisory opinion in this case. I can therefore only express my views; but I am bound to give binding effect to the advisory opinion in this case. I would therefore set aside the decision of the SAR given on 18 October 1999 and allow the appeal. The writ of summons is therefore struck out as prayed for.

Costs

This is a case where each party ought to bear its own costs. Firstly, it is a matter of great concern that the defendant, who is supposed to be a special rapporteur relating to the independence of judges and lawyers, was able to make damaging and disparaging statements of the plaintiffs, their lawyer, and the judiciary in most unpalatable terms. This he did by breaching the basic law of failing to give the right to be heard to the plaintiffs or their lawyer or the judiciary before he ventured into giving the press statements, the subject of this furore. It would seem that the defendant is far from being capable of holding an independent view on matters concerning the judiciary and lawyers in Malaysia as he has, to my mind, shown a total disregard to the meaning of the word "impartial". It would be far more desirable and would give a ring of credence to the word "impartial" if a non-citizen of a country is asked, as a special rapporteur, to comment on that country's independence of judges and lawyers. This is all the more relevant in this case because the defendant herein, and chosen as a special rapporteur, is a Malaysian citizen, is a lawyer, practising in Malaysia, and was a former president of the Bar Council, and known for his diverse views on issues publicly expressed, relating to the government and the judiciary. Perhaps it is appropriate for me to reproduce a passage from para. 66 of the advisory opinion of the ICJ. It reads as follows:

> Furthermore, it need hardly be said that all agents of the United Nations, in whatever official capacity they act, must take care not to exceed the scope of their functions, and should so comport themselves as to avoid claims against the United Nations.

In the circumstances, considering the fact that the defendant had failed to either talk to or write to the plaintiffs or to the judiciary to seek their views before commenting on the independence of the judges and the lawyers, I am of the view that an order directing each party to bear its own costs would serve the ends of justice.